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Opinion following recall of remittitur

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN LEE LUFT,

Defendant and Appellant.

E067082

(Super.Ct.No. SWF1403253)

OPINION

APPEAL from the Superior Court of Riverside County. Elaine M. Kiefer, Judge. Affirmed with directions.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and A. Natasha Cortina and Annie Featherman Fraser, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant, Brian Lee Luft, of two counts of inflicting corporal injury on his spouse (Pen. Code, § 273.5, subd. (a)),[1] four counts of criminal threats (§ 422), and one count of dissuading a witness (§ 136.1, subd. (b)(1)). The jury also found a knife-use enhancement true. (§§ 11927, subd. (c)(23), 12022, subd. (b)(1).) The court sentenced him to a total of 21 years in prison, including time for a prior serious felony, a prior strike, and a prison prior. (§§ 667, subds. (a), (c)(1), (e)(1), 667.5, subd. (b), 1170.12, subd. (c)(1).)

Defendant's main arguments on appeal relate to one of the criminal threat counts, count 3. The evidence on this count showed that he threatened to break the neck of his five-year-old son. He communicated this threat to his spouse, who is also the boy's mother. Defendant contends there was a lack of sufficient evidence to support this conviction, or a due process violation in that the jury convicted him of an uncharged offense. Neither of these arguments accurately characterizes the record. What actually occurred was an error in the jury instruction as it related to this particular criminal threat count, but the error was harmless.

Defendant also initially challenged his sentence for dissuading a witness in count 7. As we shall explain, he has abandoned that challenge. While the parties agree his sentence should not change, the abstract of judgment requires a minor correction on this count. Defendant further asserts that he should benefit from a change in the law,

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[1] All further statutory references are to the Penal Code.

effective January 1, 2019, that gives the trial court discretion to dismiss or strike the enhancement for a prior serious felony conviction. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) (S.B. 1393).) We agree that a remand is necessary so that the court may exercise its discretion with respect to the prior serious felony enhancement. We therefore remand to resentence defendant on the enhancement and to correct the abstract of judgment on count 7, but in all other respects, we affirm the judgment.

II. FACTS

Defendant and Jane Doe 1 got married in 2004 and have two children, Jane Doe 2 and John Doe. In November 2014, Jane Doe 2 was 10 years old and John Doe was five years old.

The family of four went to a relative's home for Thanksgiving in 2014. Counts 1 and 2 accused defendant of inflicting corporal injury on Jane Doe 1 and criminally threatening her on this date. On the way home from the Thanksgiving celebration, defendant became upset with Jane Doe 1 and threw a GPS device at her while she was driving. He also kicked and broke the glove box and threatened to kill her several times. When they arrived home, defendant continued to threaten to kill her. Jane Doe 1 was cleaning up the mess in the car from the glove box when defendant confronted her and burnt her ear with a cigarette. He then grabbed a sledgehammer from the garage and hit the car with it.

A few days after Thanksgiving, defendant called Jane Doe 1 from his friend's home. Count 3 accused defendant of criminally threatening Jane Doe 1 on this date. In

the phone call with Jane Doe 1, he accused John Doe of taking money from his wallet. He was angry and said he was going to break John Doe's neck. Jane Doe 1 was scared for herself and the children when she heard this, but especially for her son. After what had happened on Thanksgiving, she was concerned defendant would actually harm John Doe. When defendant hung up the phone, she grabbed an overnight bag that she had already prepared and left the house with the children.

Jane Doe 1 returned to the family home a few days later. Defendant made certain promises to convince her to return. But another incident occurred the day after Jane Doe 1 returned home. This incident was the basis for counts 4 through 7, accusing defendant of criminally threatening John Doe, criminally threatening Jane Doe 1, inflicting corporal injury on Jane Doe 1, and attempting to dissuade Jane Doe 1 from reporting a crime. The incident began when John Doe soiled his pants and defendant became angry. Defendant insisted that John Doe clean himself and called the boy "a little bitch." Defendant attacked Jane Doe 1 when she was trying to help the boy bathe—he pushed her to the floor, hit her on the head, chased her around the house, kicked her, choked her, and threatened to kill her if she called 911. During his violent outburst, defendant also said "he was going to take care of the problem," took a utility knife into the bathroom where John Doe was in the tub, and told John Doe he was going to kill him. Jane Doe 1 heard John Doe shriek and was able to get her phone to Jane Doe 2, who called 911 from the garage.

Jane Doe 1 testified about two prior incidents for which defendant suffered convictions. In 2004, when Jane Doe 2 was only a few months old, she was in her car seat, and defendant and Jane Doe 1 were arguing. Defendant threw the car seat with Jane Doe 2 in it and threatened to kill Jane Doe 1. He pleaded guilty to felony domestic violence in 2005. In 2010, when defendant and Jane Doe 1 were separated, he sent her text messages threatening to burn down her house. She was not at home, but her roommate called and said defendant was at her house with gasoline. She discovered when she returned home that gasoline had been poured around the house. Defendant pleaded guilty to felony attempted arson in 2011.

Defendant testified in his own defense. He had anger issues around 2004 because he was abusing methamphetamine. But he was able to control his anger better after he quit using drugs, took anger management classes, and "started seeking religion." He started using again in 2010. He pleaded guilty in 2005 and 2011 because he was guilty of those offenses and took responsibility for them. He maintained, however, that he was not guilty of the offenses charged in this case. He completed a treatment program in 2011 and stayed sober, and his anger issues subsided. In May 2014, he was in a car accident and was hospitalized for three weeks. Since the accident, he is blind in one eye and partially deaf in one ear. He has also had memory problems since the accident. For instance, sometimes he forgets things that he did earlier in the day or the day before.

Defendant's primary defense was one of unconsciousness. The day of the Thanksgiving incident, defendant recalled being in the car and suddenly seeing the

broken glove box, but at the time he did not know how it came to be broken. He remembered arriving home and had "a faint memory" of cigarette ash falling to the ground, but nothing about burning an ear with a cigarette or a sledgehammer. As to the second charged incident, he remembered calling Jane Doe 1 and complaining about John Doe taking money from his wallet, but he did not threaten to kill John Doe. His memory of the call was vague, but he would not have made that threat. For the most part, he did not recall the third charged incident that occurred when John Doe soiled his pants. Defendant felt that he was in "a dream-like state" during the bits he did remember. He did not purposely threaten or inflict physical harm during any of the three charged incidents. He did not know that he was doing any of these things at the time and had what he described as "blackout spells."

III. DISCUSSION

A. *Defendant's Criminal Threats Conviction in Count 3 Should Stand*

Count 3 of the information charged defendant with a criminal threat against Jane Doe 1, based on his conduct a few days after Thanksgiving 2014. This was the day defendant called Jane Doe 1 and said he would break John Doe's neck for taking money out of his wallet. Defendant contends the evidence was insufficient because it showed he threatened John Doe, not Jane Doe 1. He argues, moreover, that we may not construe the verdict as convicting him of a criminal threat against John Doe. He asserts that such a construction would violate his due process right to be convicted of only the charged

offense (or a necessarily included offense), as opposed to an uncharged offense against a different victim.

We reject these arguments. There was no due process issue because the jury convicted defendant of the offense charged in the information, and substantial evidence supported that conviction. Defendant's arguments follow from the flawed premise that only threatened harm to Jane Doe 1's person could victimize Jane Doe 1. The pertinent statute also applies when defendants threaten their victims with harm to immediate family members. The only error occurred in the jury instruction on criminal threats, but we conclude the error was not prejudicial.

As relevant here, section 422 punishes "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out . . . ." (§ 422, subd. (a).) The perpetrator must cause the threatened person "reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety . . . ." (*Ibid.*)[2] Thus, according to its plain language,

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[2] The full text of the statute states: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." (§ 422, subd. (a).)

"[t]he statute provides two alternative means by which the victim's fear could manifest itself—fear for oneself or fear for one's immediate family members." (*People v. Wilson* (2015) 234 Cal.App.4th 193, 201.) Put another way, the victim—the "person threatened"—is the one who hears the threat and suffers the "sustained fear." (§ 422, subd. (a).) But the statute's requirement of "another person" whom the perpetrator slates for "death or great bodily injury" may be the victim *or* the victim's immediate family. (*Ibid.*; see *People v. Wilson*, *supra*, at pp. 197-199 [the defendant charged and convicted under § 422 for threatening the victim with death to the victim's kids and family].) Immediate family includes the victim's children. (§ 422, subd. (b).)

The pattern jury instruction for criminal threats recognizes these alternative means of proving a threat to the victim. It defines the first element of the offense as: "The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to _____ <*insert name of complaining witness* ***or*** *member[s] of complaining witness's immediate family*>." (CALCRIM No. 1300, underlining & bolding added.) The instruction then defines the "sustained fear" element in this manner: "The threat actually caused _____ <*insert name of complaining witness*> to be in sustained fear for (his/her) own safety [or for the safety of (his/her) immediate family]." (*Ibid.*) In the parlance of the pattern instruction, the "complaining witness" is the victim, and he or she may be threatened with harm personally, or with harm to his or her immediate family.

The prosecution proceeded in count 3 on the theory that Jane Doe 1 was the victim of defendant's criminal threat to harm her family member. The information charged this

crime, the proof at trial showed this, and the jury's verdict found defendant guilty of it. The information charged defendant with violating section 422 and stated that he "did wilfully and unlawfully, with the specific intent that his statements would be taken as a threat, threaten another person, to wit: JANE DOE, (B.L.), to commit a crime which would result in great bodily injury and death, which threat on its face and under the circumstances in which it was made was so unequivocal, unconditional, immediate and specific as to convey to said person a gravity of purpose and an immediate prospect of execution of the threat, and thereby caused said person to reasonably be in sustained fear for her own safety and the safety of members of her immediate family." The information did not expressly identify who defendant slated for "great bodily injury and death"—it left that open—but it did expressly state that Jane Doe 1 was put in sustained fear for members of her immediate family. It therefore embraced the theory that defendant threatened Jane Doe 1 with death or great bodily injury to her immediate family, which would include John Doe.

Substantial evidence at trial—or evidence that was "reasonable, credible, and of solid value"—showed this charged crime occurred. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Jane Doe 1 provided this with her testimony of the phone call in which defendant threatened to break John Doe's neck. This caused her to fear for all of them, but especially for John Doe, based on defendant's recent violent behavior. She was so scared that, after the phone call ended, she took the children and fled the house for several days. The jury's verdict found defendant guilty of "a violation of section 422 of

the Penal Code, CRIMINAL THREATS, as charged under count 3 of the Information." And as we have discussed, the information charged Jane Doe as the victim in count 3.

The problem in this case is not a variance between pleading, proof, and the verdict. These three things charged, showed, and convicted defendant of the same thing—threatening Jane Doe 1 with great bodily harm or death to her immediate family member. Defendant argues that a due process violation occurs when a jury convicts a defendant of an uncharged offense, or an offense not necessarily included in the charged offense. (*In re Hess* (1955) 45 Cal.2d 171, 174-175.) "Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." (*Id.* at p. 175.) The principle defendant cites is an accurate statement of the law but irrelevant. That type of fair notice due process violation did not occur here.

The only problematic issue was the court's jury instruction on criminal threats, and only as it related to this particular count. The court's instruction misidentified the person slated for death or great bodily harm in count 3. The instruction stated, in pertinent part: "The defendant is charged in Counts 2, 3, 4 and Count 6 with having made a criminal threat in violation of Penal Code section 422. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to [Jane Doe 1] in Counts 2, 3, and 6, and [John Doe] in Count 4; [¶] . . . [¶] 5. The threat

actually caused [Jane Doe 1] and/or [John Doe] to be in sustained fear for his or her own safety or for the safety of her immediate family . . . ."

The instruction should have identified John Doe as the person defendant slated for death or great bodily injury in count 3, not Jane Doe 1. In other words, with respect to count 3, the court erroneously inserted the name of the "complaining witness" in element one, instead of the name of the "complaining witness's immediate family." (CALCRIM No. 1300, italics omitted.) The instruction correctly stated the legal elements of the offense, but it posited a factually erroneous theory in that there was no evidence defendant threatened Jane Doe 1 with harm to her person, as opposed to harm to John Doe, on the date in question.

"It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) The error is one of state law subject to the *Watson* standard of prejudice. (*People v. Guiton*, *supra*, at p. 1129; *People v. Watson* (1956) 46 Cal.2d 818, 836.) We examine the entire record to determine whether there was prejudice, "including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict." (*People v. Guiton*, *supra*, at p. 1130.) "[I]f there are two possible grounds for the jury's verdict, one unreasonable and the other reasonable, we will assume, absent a contrary indication in the record, that the jury based its verdict on the reasonable ground." (*Id.* at p. 1127.) We "should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability

that the jury in fact found the defendant guilty solely on the unsupported theory." (*Id.* at p. 1130.)

We are convinced there is no reasonable possibility the jury found defendant guilty in count 3 based on the unsupported theory of threatened harm to Jane Doe 1's person. We must place the erroneous instruction in the context of the entire record. The evidence showed one threat on the relevant date—defendant said he would break John Doe's neck. Defendant's testimony that he suffered blackout spells and could not remember the things he did, but that he would not have threatened to break John Doe's neck, was the only evidence to contradict Jane Doe 1's testimony. The jury's verdict finding him guilty on all counts showed that the jurors completely rejected defendant's unconsciousness defense and did not find him credible.

The closing arguments of both parties focused the jury on the threat to break John Doe's neck and its effect on Jane Doe 1. For instance, the prosecutor argued: "Count 3 is the phone call that the defendant made to (Jane Doe 1) making the threat about (John Doe) stealing money and I'm gonna come home and I'm gonna break his neck. Okay. That's what we're looking at in Count 3. [¶] . . . [¶] He meant to have his statement understood as a threat. Well, this is an easy one. Why else say it? . . . Why else? When you are going over to or calling (Jane Doe 1) and telling (Jane Doe 1) as you are at a store wanting to purchase alcohol, why is it that you would tell (Jane Doe 1) I'm on my way home, I'm gonna break his neck? Why else say that? For fun?" And later, the prosecutor argued: "Way more than a sustained or momentary fear when in Count 3,

remember, (Jane Doe 1) got the phone call, 'I'm on my way to break (John Doe)'s neck' because remember, what did (Jane Doe 1) do? She had a prepared bag ready to go. What does she do? This is how non-momentary it was. She got that prepared bag, gathered the kids, got them in the car and they left. That is not even close to being momentary."

Besides the unconsciousness defense, defense counsel argued in response that defendant's statement did not actually put Jane Doe 1 in fear: "And then on November 30th, we have to also think about aside from the unconsciousness issue and whether [defendant] is actually acting on purpose or willingly doing these things how scared (Jane Doe 1) is really. . . . [T]his is out of character for [defendant] because he's never threatened their son before. We heard that from (Jane Doe 1). This threat is unexpected. It comes out of nowhere. It's out of the blue. He doesn't go around threatening his kids. [¶] The statement only became concerning because of what had happened on Thanksgiving. Otherwise it may not have been that concerning. It may not have been that concerning if [defendant] had not had all these memory issues that he had been having. (Jane Doe 1) herself said she didn't know what to expect. She left in an abundance of caution. And this is such an abnormal thing. It's not something that [defendant] does. It's so abnormal that it's hard for himself to even admit that he would do such a thing. What parent wants to think that he could do that? And if he did, it wasn't [defendant] doing it."

In light of the strong evidence showing just one threat on the date in question, and the parties' arguments focusing the jury on this evidence with respect to count 3, it is

plain the jury based its guilty verdict in count 3 on this same evidence—that defendant told Jane Doe 1 he was going to break John Doe's neck. We see no reasonable probability that the jury instead based its guilty verdict on nonexistent evidence of a threat to personally harm Jane Doe 1, even considering the error in the instruction. Rather, the record discloses the jury acted reasonably in relying on the evidence available to it and the arguments of counsel highlighting this evidence. (See *People v. Guiton, supra*, 4 Cal.4th at p. 1131 [observing that "[t]he jurors 'own intelligence and expertise will save them from' the error of giving them 'the option of relying upon a factually inadequate theory,'" and concluding that the jurors relied on the factually adequate theory emphasized by the prosecutor in closing argument].) We decline to reverse defendant's conviction for a harmless instructional error.

B. *Defendant Has Abandoned the Challenge to His Sentence on Count 7*

In his opening brief, defendant challenged his sentence on count 7. His count 7 conviction was for attempting to dissuade Jane Doe 1 from calling 911, when he attacked her after John Doe soiled his pants. The sentencing triad for this offense is two, three, or four years. (§ 136.1, subd. (b)(1).) The court stated that it was sentencing defendant "to the midterm of four years" on this count. Because the court was wrong that four years is the middle term, defendant initially argued that we should reduce his sentence to the true middle term, or three years. But the People correctly point out that defendant did not account for his prior strike, which requires the court to double his sentence. (§ 667, subd.

(e)(1).) Thus, following defendant's argument to the logical conclusion, his sentence should be three years doubled, or six years.

The People argue that the court thought four years was appropriate for this count, regardless of how it calculated that sentence, and the court could have properly reached that total by doubling the low term of two years. They assert that the court's decision on the length of the sentence should govern over its description of how it calculated the sentence, and we should leave the sentence alone (or if we disagree, we should remand for resentencing on this count). Defendant has responded to the People's argument by agreeing with them and abandoning this challenge in his reply brief.

We agree with the People's position, and especially given defendant's withdrawal of the issue, we affirm defendant's sentence of four years on count 7, but remand with directions to correct the abstract of judgment. The abstract currently shows that the court sentenced defendant to the *middle* term on count 7, resulting in a four-year sentence under the "Three Strikes" law. The abstract should show that the court sentenced him to the *low* term, resulting in a four-year sentence under the Three Strikes law. (§ 667, subd. (e)(1).)

C. *Remand for Resentencing on the Prior Serious Felony Enhancement*

The Governor signed S.B. 1393 on September 30, 2018, amending sections 667, subdivision (a) and 1385, subdivision (b). (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) The amendments took effect on January 1, 2019, and allow the trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for

sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the prior versions of these statutes, "the court [was] required to impose a five-year consecutive term for 'any person convicted of a serious felony who previously ha[d] been convicted of a serious felony' [citation], and the court ha[d] no discretion 'to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.'" (*Garcia*, *supra*, at p. 971)

We originally filed our opinion in this case on August 7, 2018. After the remittitur issued, defendant filed a motion to recall the remittitur, reinstate the appeal, and permit supplemental briefing on the trial court's newly granted discretion under S.B. 1393. We granted defendant's motion, recalled and canceled the remittitur, struck the filing of our earlier opinion, and permitted supplemental briefing. In their supplemental briefing, the parties agree that S.B. 1393 applies retroactively to defendant's case. They are correct.

As we held in *Garcia*, the Legislature intended S.B. 1393 to apply retroactively to all cases not yet final on its effective date. (*Garcia*, *supra*, 28 Cal.App.5th at pp. 972-973.) Defendant's case was not final on January 1, 2019, the effective date of the amendments. We therefore remand for the court to exercise its newly granted discretion to strike or dismiss defendant's prior serious felony conviction for sentencing purposes. (*Id.* at p. 973.) We express no opinion as to how the court should exercise that discretion and conclude only that it is the trial court's prerogative to exercise that discretion in the first instance.

IV. DISPOSITION

The matter is remanded to the trial court to (1) prepare a corrected abstract of judgment reflecting that defendant was sentenced to the low term rather than the middle term on count 7, and (2) resentence defendant pursuant to sections 667, subdivision (a) and 1385, subdivision (b), as amended by S.B. 1393 effective January 1, 2019. In all other respects, the judgment is affirmed. The court shall forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

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FIELDS
J.

We concur:

McKINSTER
Acting P. J.

SLOUGH
J.